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Municipal Law Enforcement Management Report 1989 No. 2: Managing Liability Exposure: A Model for Law Enforcement

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Municipal Technical Advisory Service

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Recommended Citation

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Municipal Law Enforcement Management Report 1989

No. 2

***Managing Liability Exposure:
A Model For Law Enforcement
By Phillip E. Keith***



The University of Tennessee
Municipal Technical Advisory Service

In cooperation with:
The Tennessee Municipal League

The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee's Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League in providing technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, ordinance codification, and wastewater management.

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MTAS MUNICIPAL LAW ENFORCEMENT MANAGEMENT REPORT NO. 2
MANAGING LIABILITY EXPOSURE: A MODEL FOR LAW ENFORCEMENT

by

Philip E. Keith

1989

MUNICIPAL TECHNICAL ADVISORY SERVICE
The University of Tennessee
Knoxville, Tennessee

in cooperation with the Tennessee Municipal League

ABSTRACT

Learning methods to address liability exposure are required for municipal managers to act effectively. This report is intended to heighten the awareness of local municipal managers by reviewing causes of liability and outlining risk reduction strategies.

CITATION

Keith, Philip E., *Managing Liability Exposure: A Model For Law Enforcement*. MTAS Municipal Law Enforcement Management Report, no. 2. Knoxville: Municipal Technical Advisory Service, The University of Tennessee, 1989.

Published in February 1989 by the Municipal Technical Advisory Service, Knoxville, Tennessee; UT authorization no. E14-1050-00-009-89.

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Dear Municipal Official:

It is a pleasure to present to you this Municipal Law Enforcement Management Report, No. 2, *Managing Liability Exposure: A Model For Law Enforcement*, as prepared by The University of Tennessee's Municipal Technical Advisory Service (MTAS).

Special recognition is given to the City of Knoxville and Police Chief Philip E. Keith, MTAS Contract Law Enforcement Consultant, who has prepared this Municipal Public Safety Management Report. His research and efforts in preparing this report are appreciated.

Funding support for this Municipal Law Enforcement Management Report has been provided by the Tennessee Municipal League Risk Management Pool.

Copies of this and other MTAS Municipal Management Reports are available on a complimentary basis to officials of all Tennessee municipalities and on a limited basis to state and federal government offices. Others wishing to obtain copies may do so on a pre-paid basis. An order form can be obtained by contacting our Knoxville office at (615) 974-5301.

We at MTAS hope you find this Municipal Law Enforcement Management Report of assistance to you, and look forward to receiving your comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. L. Overman', written over a horizontal line.

C. L. Overman
Executive Director

CLO:dk1

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MANAGING LIABILITY EXPOSURE: A MODEL FOR LAW ENFORCEMENT

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I. INTRODUCTION

Municipal managers are increasingly regarded as professionals in our country and are looked to for guidance and dependability. Our society's pressure for improved performance by municipal managers is growing. There is increasing pressure on managers to be more accountable. As this pressure mounts, municipal managers become the focus of intensive review for determining if proper decisions are made or not made. This pressure results in greater personal liability for all municipal managers, but particularly managers in the law enforcement profession.

This municipal law enforcement management report is intended to heighten the awareness of local municipal managers. It has not been designed to cover every possible point concerning legal risk or liability exposure. Liability is a frightening term and causes a variety of reactions from municipal managers. Learning methods to address liability exposure are imperative, if municipal managers intend to effectively address the issue of legal risk and liability exposure.

Municipal managers' concern with liability exposure is genuine, especially when considering court decisions and settlements such as:

- o U. S. Court of Appeals decision to affirm a \$1.5 million damage award against a small town for a shooting death by a police officer.
- o A North Carolina Court, by jury, assessing \$750,000 in damages against a city for an undercover officer pointing a gun at an individual.
- o A settlement in California for more than \$5 million in a case involving a wrongful death resulting from a police pursuit.
- o U. S. District Court awarded a North Carolina man \$100,000 as a result of being kicked in the groin by a police officer.
- o U. S. Court of Appeals affirmed \$4.35 million in damages to a college professor (from Tennessee) who sued after being struck by the vehicle of a suspected bank robber being pursued by the police.
- o A jury awarded \$3.6 million in damages to a police officer who was accidentally shot by a fellow officer. This particular award exceeded the annual budget for the municipality.

- o A claimant in the southeast portion of the United States is seeking more than \$500 million from a municipality. Amounts sought by claimants in the southeast between \$100 and \$200 million are not uncommon.

These examples are not intended to intimidate municipal managers, but to make managers aware of the potential results from liability lawsuits. According to a recent Wyatt and Company survey (1986), claims susceptibility for local governments increased 28.2% over the years 1979 through 1984.¹ According to this Wyatt Survey, southeastern municipalities lead the nation in claims susceptibility.

As the legal risk or liability exposure continues to escalate in this country, municipal managers must take positive action to contain and reduce liability exposure. Managers must develop a profound philosophy toward addressing legal risk and take bold initiatives to effectively manage and reduce risk.

II. CAUSES OF LIABILITY

There are many causes of liability for municipal managers. Knowledge of specific areas of liability are often unknown, limited, or misinterpreted by managers. One recent study cited that approximately 85% of all liability lawsuits were constitutionally based.² The most common lawsuits against the police and police managers are consistent with this study finding, particularly as they relate to the first, fourth, and fourteenth amendments of the Constitution of the United States. The issue of searches and seizures are increasingly becoming more complex. Searches and seizures, once strictly limited, now extend to homes and persons. Compounding the lawsuit allegations is the "use of force" as it relates to making seizures of the person. The proliferation of lawsuits relating to constitutional issues may help managers effectively target those areas where the legal risk or exposure are the greatest. One of the most significant areas of legal risk for managers is the criminal investigative actions taken by police officers. This risk goes beyond what is routinely perceived as issues resulting from the police "investigators or detectives" and includes all police personnel involved in any "investigative" type actions.

Managers may find themselves asking the question, "What is involved with investigative type actions and what activities are included under the umbrella of investigative action?" To provide you with insight into the breadth of the issue, perhaps a commonly occurring scenario involving "police investigative action" will be helpful. The following presents a common police investigative action scenario.

It is 2:00 a. m. in Any City, Tennessee. A patrol officer is on "routine random patrol" in a high crime area and observes two young males walking down the street. The officer decides he should make an "investigative inquiry" -- stops his police vehicle near the two youths -- exits the vehicle, and commands the two youths to stop. At this point the officer has no "reasonable suspicion" and definitely no "probable cause" to stop the individuals. When the youths fail to comply with the officer's command, the officer steps in front of them and physically places his hands on the shoulders of the two youths. Again, the officer orders them to stop. The two youths react by jerking away from the officer and striking the officer on the arm. The officer's reaction to this physical force is to react with additional force. This time the force is directed through a police baton. As the incident continues, the officer uses only the force necessary to effect the arrest; however, the necessary force results in a laceration above the eye of one youth and a fractured rib of the other youth. The subsequent charges placed against the two youths are "resisting arrest" and "disorderly conduct." Courtroom consideration of the case results in the dismissal of all charges. The parents of the youths file a civil liability suit under U. S. Code 42 § 1983 alleging "false arrest," "unlawful seizure of persons," and "false imprisonment."

This scenario could continue, but the potential outcome is clear. The actions of the officer initiated a low level response by the two youths. The youths' failure to comply as directed quickly began to escalate the incident. A jury would likely hear that the officer had "no probable cause" or "reasonable suspicion" to stop the two youths and compounded the situation by using force. When the two youths exercised their right under the first and fourth amendments of the Constitution of the United States, the officer used additional force to literally effect an unlawful arrest.

The scenario described above could happen in any town. Some areas with which the manager must be concerned to reduce legal risk or exposure are presented here. First, we should examine policy development to ensure specific behavioral expectations are spelled out for police officer. Next, we need to ask did we properly train the officer on situations similar to that in the scenario? If the officer had been instructed on techniques of how to "walk along the side of the two youths" by asking questions, the altercation may never have taken place, and the officer would have gathered additional information from the youths in order to intelligently decide what should happen next. The essence of the action taken by the officer can be simply stated in a legal equation, "bad seizure is equal to bad force."

Training of police officers in establishing legal criteria is critical to reduce liability exposure. There are other areas of concern but the following areas should be considered paramount in importance to the liability reduction effort of any municipality.

1. Seizure of persons
2. Voluntary contact
3. Investigative detention vs. arrest
 - o length of detention
 - o involuntary movement
 - o use of force to detain
4. Suspect behavior
 - o running
 - o resisting questions or commands
 - o refusal to provide information requested
 - o refusal to provide identification
5. Reasonable suspicion vs. probable cause
 - o factual observation and reasonable inferences
 - o measurement through the observations of the police observers
 - o probable cause determination
6. Warrantless searches
7. Warrant requirements

The investment of specific training to address these critical areas will provide a substantial return to the manager who takes the initiative to reduce exposure through improved and increased personnel competency and performance.

Additional areas of concern include commonly made mistakes involving police vehicle accidents and in the discharging of weapons. First, consider vehicular accidents and the liability potential of this particular exposure. "Normal accidents" involving police vehicles and personnel can be classified into three broad areas:

1. Routine operations.
2. Emergency operations.
3. Pursuit operations.

Routine

For the sake of simplicity, the third area will not be discussed in detail, as the knowledge on the potential for liability exposure involving police pursuits is commonplace. Initially, the police manager must never make assumptions regarding the driving abilities of police officers, even the routine operations, or the level of the officer's awareness of liability possibly resulting from normal vehicle operations. Each year police agencies train officers in the proficiency of firearms use. Statistically, however, each year more officers are injured or killed in automobile accidents than by firearms. Nationally, more than three officers are killed in the operation of police vehicles for every one officer killed through the use of firearms. The in-service training in most police agencies in Tennessee fails to address even the basics of vehicular liability.

Imagine a good attorney for the plaintiff asking the following questions:

- Question One: Chief, when was the last time you verified that each officer under your command possesses a valid driver's license?
- Question Two: Chief, what training is provided to each officer on the basics of defensive driving or driving under adverse weather conditions?
- Question Three: Chief, how do you verify that an officer possesses the skills to operate a police vehicle, especially with emphasis on observation and operating a vehicle at the same time?

Through these questions, the plaintiff's attorney is setting the stage for the jury to determine that the police chief does not exhibit a "standard of care" policy as prescribed by the ruling of the U. S. Supreme Court under 42 U.S. 1983. This scenario is not unique to any city in Tennessee, as most do very little to establish a reasonable "standard of care."

Police officers must be trained in the basic operation of police vehicles to reduce common exposure. Included in this training should be subject matter to address the questions raised in the hypothetical courtroom situation described above. Minimal training time is required and the achievement of this training could be facilitated through sound policy development, in-service training, roll call training, on-the-job supervision, and training by first-line supervisors.

Emergency

Now let us examine the police policy for emergency vehicle operations training. Similar to the "routine" operational training, most Tennessee law enforcement agencies conduct very little training for "emergency" operations of police vehicles. Again, a general assumption is made by most law enforcement managers that officers will develop skills (without formal or documented training) with time and experience.

Again, image a plaintiff's attorney asking another series of questions that include the following:

- Question One: Chief, do your officers go through any training on the operation of police vehicles under emergency operations like responding to alarm calls, felonies in progress, request for assistance from other police officers, while in basic school?
- Question Two: Chief, how did you verify the individual officer's proficiency in driving under emergency conditions?
- Question Three: Chief, when was the last time any of your officers received training on emergency operation of police vehicles?
- Question Four: Chief, according to your policy manual, you permit your officers to exceed the posted speed limit substantially under emergency responses. How do you know that each individual officer is proficient in skills necessary to operate a vehicle under emergency conditions?
- Question Five: Chief, are you aware that more officers and citizens are injured or killed by emergency operation of police vehicles than by the use of deadly force?
- Question Six: Chief, through the policy contained in your police manual have you established a reasonable "standard of care?"

As a result of this questioning, the jury may be viewing the actions of the police as not establishing a "reasonable standard of care." Again, proper training, policy development, and proficiency documentation could reduce the liability potential.

Personnel Areas

Another potential for liability exposure for police and municipal managers is employee relations, including hiring, firing, grievance resolution, promotion, and training. Managers must consider each of these areas to reduce legal risk. According to the Wyatt study, 23% of the lawsuits filed are based on employee treatment.³ All too often these issues are addressed by only the city manager, personnel manager, or the chief of police, and are not the direct responsibility of supervisory personnel. Performance appraisals of supervisory personnel should contain evaluation dimensions on how well the supervisor performs in each of these sensitive areas. Incorporation of these responsibilities into all supervisory levels will mandate supervisory performance as well as spread the liability responsibility to all levels. As stated in the previous examples, a good plaintiff's attorney will pursue questioning concerning employee treatment and the training of supervisory personnel and proficiency in personnel management.

Policy Development

The final area of liability exposure to be discussed focuses on policy development. As knowledge about law enforcement policy development increases, this particular area is becoming increasingly popular in lawsuits. Policy development should be addressed on four levels:

1. Policy development criteria
2. Policy training
3. Retention and proficiency testing
4. Supervision

The policy development criteria should include the process used to develop police policies. This is the first step in establishing a "standard of care." This process should include problem identification, alternative considerations, legal issues, subject matter research, employee behavioral expectation, training on essentials of the policy, testing for proficiency, and identification of supervisory

responsibilities. Policy development must be developed on a sound, rational basis and should not be crisis oriented. The policy should be a statement of procedures listing what an officer can and cannot do. Policy development should be incorporated as a major initiative for all law enforcement agencies and the notion of a "quick fix" should be dispelled. Policy development should be predicated on what is legally required by state or local laws or ordinances. Caution should be given to policy developers about the use of the "boiler plate" approach and the weaknesses of simply adopting what is utilized in other police departments. Using the "boiler plate" or "canned goods" approach permits many broad assumptions to be made, without verification of legal issues or operational protocol in other agencies or municipalities.

Training Policy

The second area of concern regarding policy development is training. What should policy training include on policy development; how will the training be conducted; and who will administer the training are the critical questions to be asked. Training in policy is the second logical step in establishing a "standard of care" for the law enforcement agency. The training can be facilitated through basic recruit training, roll call training, or on-the-job supervision by first line supervisory personnel. The incorporation of this approach will emphasize the importance of policy training throughout the agency.

Testing

The third area of concern with policy development is retention and proficiency testing. Training on policy should target the essential importance of each policy and proficiency testing and should ensure that each officer "knows" the policy. This aspect is critical, as testing in many agencies is not well understood. For example, during annual in-service training each officer is required to make a passing score to make certification. However, the officer may score an 80 on the exam indicating an average knowledge of the subject matter taught. A skilled plaintiff's attorney might ask, "What questions did the officer miss?" Close examination by the agency (as well as the plaintiff's attorney) might reveal that the 20% of the questions missed were the most important questions about search and seizure. Quickly, the question surfaces, does our testing actually and accurately attest the officer's knowledge of critical elements? Proficiency testing should be designed to test the officer's competency and retention ability on critical training elements. This proficiency training does not have to be overly complex. The questions asked and the training provided should be designed to reinforce critical knowledge elements to establish a "standard of care" through the department.

Supervision

The final aspect to be addressed in policy development is the role of supervision. First, supervisory personnel must have an adequate competency level regarding knowledge and understanding of departmental policies. The establishment of this competency level can be achieved through training for officers. The supervisor's policy role and responsibility should be clearly articulated to every level of supervision and management. Complacency cannot be tolerated if the legal risk is to be minimized in policy compliance. Training documentation and prompt reporting are the two best methods to ensure an aggressive approach to policy compliance. The supervisor's role in policy development and compliance should be incorporated into every staff meeting, as policy responsibilities must become a reflex and not an exercise for managers.

III. DEVELOPMENT OF RISK REDUCTION STRATEGIES

The importance of managing legal risk in law enforcement must be included in the administrative and operating procedures of the municipality and the law enforcement agency. To effectively incorporate the management of legal risk into day-to-day operations, strategies to reduce risk must be viewed as high priority. Managerial initiatives should be based on positive action to reduce and limit the liability exposure through all phases of agency planning processes. Just as an agency plans for the budget process, it should also develop strategies to reduce liability exposure. This conscious approach to liability reduction places a higher priority on the management awareness of liability risk and creates a managerial focus on risk reduction strategies. This essential shift of emphasis will turn simple "talk about reducing liability" into "doing something about reducing liability exposure."

Developing strategies to reduce liability risk must be fostered by the agency executive. This crucial first step demonstrates to the command staff, first-line supervisors, and line personnel the executive commitment to liability reduction as an agency-wide initiative. The second step of the process requires the agency executive and the command staff to institutionalize the concepts of liability reduction and legal risk avoidance planning into the organization's operation. Legal risk avoidance planning includes the adoption of an "anticipatory planning" approach which emphasizes the following:

- o Broadening the imaginative planning capabilities.
- o Search for new approaches.

- o Focus on department wide issues.
- o Break away from the "complete staff work model."
- o Reduce the mentality that only a few can plan or be creative.
- o Expanding the creative resources within the organization.
- o Redefining the roles and responsibilities to encourage or require participation in legal risk planning.
- o Increasing the understanding and knowledge of liability exposure issued and legal risk reduction concepts.

The critical need for police command and supervisory personnel to adopt and participate in legal risk reduction and strategy development involves several key elements: (1) motivation and role modeling, (2) creating a problem-solving climate among departmental supervisory personnel, (3) communicating the organizational risk reduction philosophy and commitment, and (4) improving organizational competency to manage future legal risk.

The first key element, motivation and role modeling involves each supervisory level and its respective subordinate level. Motivation and role modeling are companion attributes as each impacts the other. Motivation is the supervisor's responsibility to understand each individual sufficiently to know what moves the individual toward the achievement of personal or departmental goals. This is not a simple task. However, if each supervisor dedicated only five minutes per day on subordinate motivation the task could be achieved with relative ease. Complacency represents a major organization hurdle for both private and governmental employees. However if complacency is lessened through on-going motivation initiatives, supervisory personnel will be more likely to see successes in risk reduction.

Role Modeling

Role modeling is the second part of this element. Every individual seems to adopt a role model style. Individuals are positively or negatively influenced by other individuals within any organization. Understanding motivation is important to understanding role models, as most subordinates attempt to model their behavior based on a supervisor's behavior. Mirror imagery is often the key motivational factor of young adults. A subordinate will first look to a supervisor as the image

to be mirrored. If this effort is not successful, the individual will then find a peer to model. Educating supervisory personnel on the impact of role modeling is important, and will place supervisory members "on notice that" their individual behavior (full spectrum) impacts the performance of the organization.

The second key element is creating an open problem-solving climate within the management staff and throughout the organization. Although this task appears to be simple, many police organizations resist this initiative, as it conflicts with tradition and in some cases is interpreted as job threatening. Creating a problem-solving climate reinforces the efforts of the chief executive of the agency in encouraging "anticipatory planning" and the development of risk reduction strategies.

The third key element, communicating the organizational philosophy commitment is essential to developing a solid foundation for risk reduction. Every member of the organization must be oriented, educated, and trained toward the organizational philosophy of reducing liability risk and exposure. This effort promotes understanding and sends a message to the members of the organization on the position and attitude toward liability reduction.

The final key element is improving organizational competency. This issue represents the basis for many lawsuits, is perhaps the most overlooked performance measure in law enforcement, and ironically the basis for most community controversy about law enforcement. Organizational competency relates to the adequacy of programs, overall management, and the development of the ability of individuals and groups. The depth of employee talent and skills is an indication of current and future performance. It is an indicator of the priorities of the leadership within the police agency. The development of organizational competency is an investment in the future to reduce liability risk and exposure.

CONCLUSION

Managing liability exposure in the law enforcement profession is increasing in difficulty. However, the response from law enforcement must be based on sound foundations and consistency in reducing high risk for liability exposures. Establishing these sound foundations is predicated on four major themes:

1. Policy development.
2. Training and proficiency attainment.
3. Discipline and performance.
4. Supervision and management.

The developmental process adopted by the law enforcement agency to reduce liability exposure should include each of these themes. Each of the themes are interrelated and require continuous organizational maintenance. Through sound strategy development, every law enforcement agency can achieve the reduction of liability exposure and promote progressive change throughout the organization without the intimidation of liability exposure.

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Steven A. Cook, U. S. Department of Justice, Assistant United States District Attorney, Eastern Division, Tennessee.

Timothy D. Crowe, Director, National Crime Prevention Institute, University of Louisville, Louisville, Kentucky.

Attorney George J. Franscill, former counsel for the City of Los Angeles, California.

Attorney Randy Means, Charlotte, North Carolina, Police Department.

Dr. Roger Stanton, Professor of Management, California State University.

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ENDNOTES

1. *Public Officials Liability Insurance: Understanding The Market*, The Wyatt Company, ICMA, Washington, DC, 1986.
2. Charlotte Police Department, Randy Means, 1986.
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